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No. 88-1723

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ARCHER-DANIELS-MIDLAND COMPANY and
NABISCO BRANDS, INC.,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

J. RANDOLPH WILSON *
WILLIAM H. ALLEN
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Petitioner Nabisco Brands, Inc.

OWEN M. JOHNSON, JR.*
PAUL B. HEWITT
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
Attorneys for Petitioner Archer-Daniels-Midland Company

* Counsel of Record

August 24, 1989

RULE 28.1 STATEMENT

Petitioners' Rule 28.1 Lists were included in the Petition for a Writ of Certiorari.

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ARGUMENT

As the Government says, "the central issue in this case is the proper definition of the relevant market." (Br. in Opp. 6.) Indeed, it is the only issue, and this case will therefore enable the Court to focus squarely on one of the most important areas of antitrust law. Market definition is the threshold issue, and is often decisive, in *every* merger or takeover case and in numerous other antitrust matters as well. The relevant market must be delineated before one can even begin to evaluate whether the conduct in question involves an unreasonable restraint upon competition. Market definition permeates all of antitrust, both in litigation and counseling.

The particular issue of market definition in this case concerns the legal significance of a price difference (typically 10% to 30% in particular transactions) between two interchangeable products with actual or perceived quality differences. This is a significant and recurring antitrust issue that the Court has not addressed comprehensively in the more than three decades since its decision in *United States* v. *E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) ("*Cellophane*"). The Court there held that cellophane and twelve other types of flexible wrapping materials selling at substantially different prices (different by up to 771%) were in the same market for antitrust purposes because they satisfied the legal criteria for market definition, *i.e.*, functional interchangeability, cross-elasticity of demand, and price sensitivity or price correlation. A familiar supermarket example is a highly advertised food product on the shelf beside a lower priced substitute private label product, where both products are in the *same* market because the criteria of *Cellophane* are satisfied and the price difference reflects a competitive evaluation of actual or perceived quality differences in the marketplace. *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980).

In this case, the trial court applied the market definition criteria of *Cellophane* to the undisputed facts and ruled that the Government could not sustain its burden of proving that high fructose corn syrup (HFCS) constitutes a stand-alone market entirely separate from sucrose (sugar). Then, on appeal, without purporting to disturb the trial court's factual findings, the court of appeals reversed. It ruled that HFCS is in a completely separate market from sugar, even though they are interchangeable over the entire range of uses of HFCS, and even though (as the Government admitted) HFCS had to compete head-to-head with sugar as the entrenched sweetener when HFCS first entered the market about 10 years prior to the commencement of this case. The court of appeals relied on two facts, namely, that throughout

the years in which HFCS has confronted sugar in the marketplace, the price of HFCS in particular sales has been 10% to 30% lower than the price of sugar, and that during some of those years the domestic price of sugar was supported by the U.S. Sugar Program.

The Government argues that the court of appeals was correct in holding that HFCS and sugar, "though functionally interchangeable, . . . are not reasonably interchangeable because of the price differential between the two products" (Pet. 7a), and for the same reason do not have "a high cross-elasticity of demand" (*id.* at 11a-12a). On this basis, the Government contends that the lower court's decision is not in conflict with any decision of this Court or of other courts of appeals. To the contrary, the decision below in this case cannot be reconciled with *Cellophane* and the lower court decisions that have followed it.

1. Because *Cellophane* established that interchangeable products are not in separate markets merely because of quality-related price differences, the Government is forced to rely heavily on such assertions as, "there is no perceived difference in quality [between HFCS and sugar] with respect to HFCS applications" (Br. in Opp. 10) and "the difference in prices is not a function of consumer preferences" (*id.* at 11). Proceeding from the unsupportable premise that there are no quality differences, the Government then contends that the price difference between sugar and HFCS must be *attributed solely* to the on-again-off-again Sugar Program, the presence of which (according to the Government) distinguishes this case from the many cases holding that a price difference does not create two markets for competing products where other evidence on interchangeability, cross-elasticity and price correlation indicates just one market. In a final effort to brush aside quality differences, the Government says that petitioners did not claim that quality differences

explained any part of the HFCS-sugar price differential until they petitioned for rehearing in the court of appeals.

The Government is wrong on all counts. Petitioners consistently urged in both courts below, and the district court found (Pet. 52a), that "HFCS has been handicapped" in competing with sugar by undisputed quality differences, both actual and perceived, that favor sugar. As the district court found, sugar benefits not only from being the "dominant" sweetener (Pet. 40a), entrenched in the market for centuries, but also from its greater versatility in both liquid or dry form as compared to HFCS which, until recently, was sold only in liquid form (Pet. 52a), and from being sweeter than the popular commercial grades of HFCS (Pet. 19a)—which is a quality difference that gets lost when sugar and HFCS are described as "interchangeable" for all uses of HFCS. Sugar has other quality advantages in some of the six major end-use categories where HFCS continues as the weaker competitor and has only a small share of sweetener use despite the 10% to 30% price difference. (Pet. 25a.) The court of appeals acknowledged that HFCS and sugar are merely "similar" in quality. (Pet. 7a.)

On the undisputed facts in the very full district court record, it simply cannot be said that the lower price of HFCS is not reflective of actual or perceived quality differences between HFCS and sugar. Hence, the linchpin of the Government's argument—that the price difference is attributable solely to the Sugar Program and not to competitive evaluations of quality differences in the marketplace—cannot be sustained. Indeed, as the district court expressly noted, "[t]he Government recognizes that HFCS had to compete with sugar when HFCS first entered the market [until] . . . some undisclosed recent date." (Pet. 50a.)

In truth, this "recent date" continues to move forward to the current period because the record shows that HFCS and sugar continue to compete for sweetener use at the

same price differential, with or without the Sugar Program. The Government plays down but is nonetheless forced to acknowledge the undisputed fact that "there have been brief periods without effective price support from the U.S. Sugar Program." (Br. in Opp. 3 n.2.) Those "brief periods" in fact extended from 1975 to 1981, about half the time that HFCS was in vigorous competition with sugar before this lawsuit. During such "brief periods" of no effective Sugar Program, the price differential was the same as during the equally long (or "brief") periods when the Sugar Program was effective, and prices for HFCS and sugar continued to move in lockstep during both periods, with or without an effective Sugar Program. Therefore, the Sugar Program does not explain the price differential, does not set this case apart from *Cellophane*, and does not establish as a matter of law that HFCS cannot be "reasonably interchangeable" with sugar.

2. Nor can the decision below be justified, as the Government's brief tries to imply (Br. in Opp. 3, 5-6), by pointing to the statement in the court of appeals' opinion that there is not "a high cross-elasticity of demand between sugar and HFCS." The court did not explain what is "high," and it effectively ignored the district court's specific finding of "significant price correlation," which is a recognized indicator of cross-elasticity. Beyond that, the court of appeals made no analysis of cross-elasticity separate from its price difference analysis. It said merely that, "[b]ecause of the significant price difference between HFCS and sugar, a small change in the price of HFCS would have little or no effect on the demand for sugar." (Pet. 11a-12a). The court thus *presumed* low cross-elasticity of demand—and held sugar to be in a separate market—solely because of a price differential. This result is in direct conflict with *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F.2d 524, 527-29 (2d Cir. 1958), upon which the district court extensively relied. (Pet. 32a, 51a.)

If the court of appeals is permitted to make this price-based presumption about cross-elasticity without citing any supporting evidence and without even purporting to reject the district court's specific findings of interchangeability, cross-elasticity and price correlation, then *Cellophane* and all the other cases relied upon by petitioners were wrongly decided. For *Cellophane* held, 351 U.S. at 400, that there was "high cross-elasticity of demand" between packaging materials whose prices differed enormously—as much as 771% (Pet. 13, 35a n.24). And so of the differentially priced dog food in *Liggett & Myers, Inc. v. Federal Trade Commission*, 567 F.2d 1273, 1274-75 (4th Cir. 1977), the differentially priced swimming pool equipment in *George R. Whitten, Jr., Inc. v. Paddock pool Builders, Inc.*, 508 F.2d 547, 553-54 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975), the differentially priced computers in *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 292 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980), and the differentially priced frozen waffles in *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840-41 (2d Cir. 1980). In each of those cases, the courts found a single market despite significant price differences between the two products at issue.

Contrary to the Government's flawed explanation, the decision below is understandable only as having created and applied a new rule of law that a price difference, persisting with or without a government price support program, creates two separate markets despite undisputed evidence satisfying *Cellophane*'s criteria for a single market.

As to its statements concerning cross-elasticity of demand, the court of appeals pointedly did not rely upon the Government's theory of "irreversibility," which the brief in opposition tries to reinsinuate into the case (Br. in Opp. 3) by arguing that HFCS has achieved all the inroads it is going to achieve against sugar and that the process of users' switching to HFCS is "irreversible."

The district court rejected the "irreversibility" theory on the facts, relying on undisputed evidence in a summary judgment record acknowledged to be virtually equivalent to a full trial record. The district court found, based on deposition testimony as well as detailed supplemental affidavits from important sweetener buyers, that HFCS users have maintained their facilities in a state of readiness for an immediate switchback to sugar, have been sensitive to relative sweetener prices, have continued to negotiate potential supply contracts with sugar companies, have frequently threatened HFCS suppliers with a switchback to sugar if HFCS prices did not suit them, and in fact have switched back and forth, including an example of switching back and forth by one of the largest sweetener users in the world, Coca Cola. (Pet. 47a-50a.)

In bringing this case, the Government has alleged, and it has the burden of proving, a separate market for HFCS alone. The district court found that the Government's evidence was clearly insufficient to meet that burden in light of the contrary evidence supporting the following specific findings:

—"the basic underlying fact of functional interchangeability . . . is accepted by both parties. There is no factual issue to be tried . . . ." (Pet. 39a.)

—"[o]n undisputed evidence in the record, the court finds cross-elasticity of demand between HFCS and sugar." (Pet. 41a.)

—"[t]he court finds there is significant price correlation between HFCS and sugar." (Pet. 43a.)

If the decision on appeal had been predicated on a rejection of the factual findings of the trial court on these *Cellophane* tests, as the Government now insinuates, the court of appeals at least should have acknowledged the trial court's specific findings and explained their rejection. *Northwest Wholesale Stationers, Inc. v. Pacific*

Stationery & Printing Co., 472 U.S. 284, 297 n.8 (1985). The court below did not do so, and instead based its decision on a new rule of law that allows the Government to meet its burden of proof merely by pointing to the HFCS/sugar price differential.

3. The Government contends that the cases cited by petitioners (Pet. 12-16) as inconsistent or in conflict with the decision below, including *Cellophane*, are merely instances of different results because of different facts. That is not so. In this case, just as in the cited cases, the district court correctly applied to undisputed evidence the traditional antitrust standards of interchangeability, cross-elasticity and price correlation precisely in the pattern of *Cellophane* and the other cases. The court of appeals reversed on the law, relying solely on the price differential.

Against the several conflicting decisions that we have cited, the Government cites just one case, *United States v. Aluminum Company of America*, 377 U.S. 271 (1964), in which, it claims, a price difference "was decisive in the Court's market definition." (Br. in Opp. 9.) But in that case (which did not itself cite *Cellophane*), the Court emphasized that in addition to a very large price difference, the two products in question (aluminum conductor and copper conductor) had "developed distinctive end uses—aluminum as an overhead conductor and copper for underground and indoor wiring applications in which aluminum's brittleness and larger size render it impractical." *Id.* at 277. Here, in contrast, the Government admits that sugar can be easily substituted for every known use of HFCS, and the district court specifically found that *both* HFCS and sugar fill part of the sweetener requirements across the board in all major categories of end use. (Pet. 25a.) Furthermore, in the aluminum/copper conductor case, the Court expressly noted that—quite unlike HFCS and sugar whose prices

have been significantly correlated—"aluminum and copper conductor prices do not respond to one another." *Id.* at 276.

There is no precedent for the legal rule in the decision below. It conflicts with decisions of this Court and other courts of appeals, and it can only lead to confusion in an increasingly important area of antitrust law.

Insofar as the decision below treats government price supports under the Sugar Program as making the price differential in this case different from the price differences in *Cellophane* and other cases, there is no warrant for such treatment. The Government as much as says so. It states, quoting *International Telephone & Telegraph Co. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975), that a government program resulting in a price differential is "simply . . . another fact of market life" (Br. in Opp. 9 n.12)—just like, we might add, quality differences and user perceptions. The only antitrust precedent on point, which is a decision of a different panel of the same court of appeals, is squarely opposed to any market definition criteria that would distinguish, and give decisive effect to, a price difference merely because it occurs in the context of a government support program. *City of Mt. Pleasant v. Associated Electric Coop.*, 838 F.2d 268, 279-80 (8th Cir. 1988) (Pet. 16-18).

CONCLUSION

For the reasons stated here and in the petition, the petition should be granted. The Court should seize this opportunity not only to blunt the confusion bound to follow in the footsteps of the decision below, but more importantly to reexamine an increasingly important and pervasive aspect of antitrust law that the Court has not squarely addressed for over 33 years.

Respectfully submitted,

J. RANDOLPH WILSON *
WILLIAM H. ALLEN
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Petitioner Nabisco Brands, Inc.

OWEN M. JOHNSON, JR.*
PAUL B. HEWITT
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
Attorneys for Petitioner Archer-Daniels-Midland Company

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